

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Communications Services)	CG Docket No. 11-41
To Native Nations)	

COMMENTS OF THE
NATIVE TELECOM COALITION
FOR BROADBAND

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SUMMARY

The Comments of the Native Telecom Coalition for Broadband (NTCB)¹ state that there are unique circumstances demanding a complete resolution of universal service policy for Native Americans. When one considers the daunting task of deploying broadband in rural America, the challenges admittedly become much greater to reach Native Americans on Tribal lands, including the Hawaiian Home Lands. A “hundred years” of geographic isolation on Tribal lands and related income disparity are real barriers prohibiting Native Americans from experiencing quality of life enhancements and economic opportunities that have become available to most Americans through advanced communications technology.

Lack of infrastructure (lack of multiple communications technologies) is the reason that this Commission should take quick action to facilitate Native Americans catching up with the rest of the nation. This will require the Commission to fashion a universal service program unique to the needs of Native American communities that adequately recognizes and addresses Native challenges, and allows continued deployment of broadband infrastructure on Tribal lands.

In expedient fashion the Commission should undertake corrective action and create a new universal service program – “Native Americans,” that incorporates a separate Native Broadband Fund within the Universal Service Fund for the dual purposes of 1) ensuring extension of broadband networks/connectivity to Tribal lands – Indian Country, Alaska Native Regions, and Hawaiian Home Lands, and 2) sustaining the continued efforts of carriers that deliver voice and

¹ The NTCB is composed of the entities listed on Appendix A. Each of these entities represents entities interested in improving the availability, quality and adoption rates of voice, mobile, broadband and Internet Access services on Tribal lands, Alaska Native Regions or the Hawaiian Home Lands.

emerging/evolving broadband services to these native groups, i.e. American Indians, Alaska Natives, and Native Hawaiians.

The NTCB believes that the Hawaiian Home Lands, which are residence to Native Hawaiians and equivalent to Tribal lands, should be considered “Tribal lands” for regulatory purposes. Rationale for this conclusion includes the historical background of Native Hawaiians, which is similar to other Native Americans. In 1893 the Hawaiian monarchy was overthrown by force and replaced first by a Provisional Government, and in 1894 the islands became the Republic of Hawaii.

In 1921, while Hawaii was a United States Territory, Congress enacted the Hawaiian Homes Commission Act (“HHCA”) to rehabilitate Native Hawaiian people, particularly in returning them to the land to maintain their traditional ties with the land. A stated purpose of the HHCA was to provide supporting infrastructure, so that homestead lands would always be usable and accessible; and to provide financial support and technical assistance to Native Hawaiian beneficiaries so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, the traditions, culture and quality of life of Native Hawaiians would be “forever self-sustaining.”

Clearly the goal of facilitating a “long-term tenancy” for resettlement of the Hawaiian Home Lands (HHL) was contingent upon also fostering economic development for economic self-sufficiency of the Native Hawaiians. Almost 100 years after the passage of the HHCA, while still striving to achieve resettlement and perpetuation, broadband communications have become an essential component needed for attracting new business and creating jobs for potential Native Hawaiian residents of HHL.

Providing communications infrastructure to the Hawaiian Home Lands presents some very unique challenges. For example, Sandwich Isles' Service Area consists of rural, low density portions of volcanic islands separated by deep ocean. Construction of inter-island facilities is thus expensive and involves an extensive permitting process. Environmental restrictions designed to protect marine life severely limit the time during which undersea facilities are allowed to be constructed. The thin top soil lays on volcanic rock, coral and sand. Despite its reputation for a usually balmy climate, Hawaii is subject to recurring severe tropical storms which easily destroy aerial communications facilities. As a result of these factors, modern, reliable communications infrastructure is exceptionally expensive to construct and operate anywhere in the state. Like much of rural Hawaii, the HHL historically were plagued with inadequate or non-existent telephone service. The high cost of physical facilities in rural Hawaii is compounded by the low population density of most of the state outside the metropolitan area of Honolulu. Sandwich Isles' study area, 98% of which is located away from Oahu, has no population centers for a variety of reasons outside of its control.

The historical similarities, negative impacts of geographic isolation, and high cost of deploying critical broadband infrastructure for HHL justify eligibility of Native Hawaiians for inclusion in the same federal programs that are intended to fund needed infrastructure and sustain broadband services to improve the socio-economic standing of American Indians and Alaska Natives.

If the existing universal service programs were not in place, it is unlikely that any Native American communities on Tribal lands would have the quality of communications service they have today. And what has been accomplished is small when compared to the need that exists throughout Tribal lands. There are only eight tribally owned and operated

communications companies serving the whole of Indian country – there are over 565 Indian tribes, only 311 of which possess Tribal lands. The eight tribal members of the National Tribal Telecommunications Association have been held up as a model for other tribes to follow in their quest for a quality communications platform on Tribal lands. Tribal governance and operation of these companies has allowed them to truly identify and meet the needs of their native peoples. However, the start-up efforts of these eight tribes will be for naught, if they are not supported with continued “sufficient” and “predictable” USF.

Universal service programs must be maintained at existing levels to benefit Native American communities, and these programs must become “fixed in place” – that is, the regulatory uncertainty that is prevalent in the current environment must be replaced with long-term federal regulatory policy. A new universal service program for Native Americans, i.e. a Native Broadband Fund (“NBF”),² should be implemented by the FCC to encourage broadband deployment on Tribal lands. The National Broadband Plan clearly summarizes the many benefits, including economic development, stemming from the adoption of broadband services as they become readily available throughout America.

A NBF is needed to overcome the financial obstacles inherent in constructing critical, broadband infrastructure on Tribal lands, including HHL. One of the most pressing problems affecting rural Local Exchange Carrier’s is their inability to borrow capital due to current regulatory uncertainty. A NBF, if it meets the 1996 Telecom Act goals for universal service funding programs of “sufficiency” and “predictability,” will overcome this general regulatory uncertainty and provide stability and renewed access to capital for broadband providers that serve Tribal lands. Continuous deployment of a robust broadband communications platform will

² See Appendix B for a detailed explanation of the Native Broadband Fund Concept

work toward the greater fulfillment of congressional mandates directed toward resettlement of Tribal lands and economically sustaining newly formed communities on those lands.

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The Native Telecom Coalition for Broadband (NTCB)¹ file their Comments in this Notice of Inquiry pursuant to its adoption and release by the Commission on March 4, 2011 (FCC 11-30). In the Notice of Inquiry the Commission invites comments on the challenges and barriers faced by Native Nations in achieving broadband adoption and utilization. The NTCB will address steps the Commission should take to create sustainable business and deployment models to address the significant communications infrastructure needs, market challenges, and demand aggregation requirements specific to Tribal lands. The Commission also seeks comments on whether it should adopt a single definition of Tribal lands for all communications related regulation. Regarding this definition, American Indian and Alaska Native “Tribal lands” are clearly established in federal and state law. The addition of Hawaiian Homelands to the

¹ The NTCB is composed of the entities listed on Appendix A. Each of these entities represents entities interested in improving the availability, quality and adoption rates of voice, mobile, broadband and Internet Access services on Tribal lands, Alaska Native Regions or the Hawaiian Home Lands.

definition of Tribal lands for regulatory purposes is reasonable given the many parallels that exist among American Indians, Alaska Natives, and Native Hawaiians, including similar history, geographic isolation, and other extreme challenges. These factors naturally argue for a common regulatory solution to assist all Native Americans advance and prosper with the aid of modern/broadband communications infrastructure and services. To that end, the NTCB advocate for the creation of a new “Native American” universal service program, a “Native Broadband Fund,” for the dual purposes of 1) ensuring extension of broadband networks to Tribal lands and 2) sustaining the provision of broadband services to Native Americans, i.e. American Indians, Alaska Natives, and Native Hawaiians.

I. BARRIERS: THE RURAL-RURAL-RURAL DIVIDE – TRIBAL LANDS

When one considers the daunting task of deploying broadband in rural America, the challenges admittedly become much greater to reach Native Americans on Tribal lands, including the Hawaiian Home Lands.² Voice and broadband service penetration levels are lower for American Indians, for example, than any other demographic. The penetration rate for basic voice service lags the national average by 30%. And the explanation for these results begins with lack of infrastructure.

Lack of infrastructure (lack of multiple communications technologies) is the reason that this Commission should take quick action to facilitate Native Americans catching up with the rest of the nation. This will require the Commission to fashion a universal service program unique to the needs of Native American communities that adequately recognizes and addresses Native challenges, and allows continued deployment of broadband infrastructure on Tribal lands.

² Sandwich Isles Communications, Inc. and Mescalero Apache Telecom Inc., Comments in the Matter of Connect America Fund, WC Docket No. 10-90, filed July 12, 2010, pp 2-13.

It is readily apparent that Native communities tend to be geographically remote. In Alaska and Hawaii, extreme separation from the lower 48 amplifies the cost factors and build-out times to reach unserved and underserved Native developments/villages. Where Tribal lands are, or were, once served by larger ILECs, there is generally a history of neglect and minimal infrastructure deployment because initial and ongoing costs are very high to reach these areas far removed from urban/suburban networks.

Tribal sovereignty issues have also complicated the ILEC decisions to deploy infrastructure in Indian country. Alaska Regional Corporations and villages, the State of Hawaii, Department of Hawaiian Home lands and Hawaiian Homes Commission are all similar sets of unique native governmental interfaces. The special needs of these groups must be taken into consideration to adequately plan broadband networks that truly serve Native communities. Which fact underscores the reason why tribally owned telecommunications companies and small non-tribal RLECs with a local presence and a Native community focus – and a commitment to getting the job done – are the providers of choice.

Another intuitively obvious challenge for small pockets of Native American populations on Tribal lands is that they do not represent a significant source of revenue to the broadband provider. Consequently, commercial financing to construct the needed infrastructure and an ongoing source of operating revenue to maintain the network cannot be justified within a typical, market-based business plan. Entities that might be deemed to have “sufficient” resources to get the job done are not interested in building-out to these remote areas, nor do they have an appreciation for the local needs and level of commitment that is needed to fully serve Native communities (the tribe’s cultural, spiritual, economic, personal and public safety, and other factors unique to these remote areas are an integral aspect not only of network planning, but also

of the continuing provision of appropriate/necessary communications services and customer interface).

II. HAWAIIAN HOMELANDS SHOULD BE CONSIDERED TRIBAL LANDS FOR REGULATORY PURPOSES

A. Historical Background of Native Hawaiians Similar to Other Native Americans

In 1893 the Hawaiian monarchy was overthrown by force and replaced first by a Provisional Government, and in 1894 by the Republic of Hawaii.³ In 1921, while Hawaii was a United States Territory, Congress enacted the Hawaiian Homes Commission Act (“HHCA”)⁴ to rehabilitate Native Hawaiian people, particularly in returning them to the land to maintain their traditional ties with the land. The Hawaiian politicians who testified in favor of the act specifically referred to the devastation of the Hawaiian population, the loss of the land, and the need for Hawaiians to be able to grow traditional crops such as taro. The HHCA set aside approximately 203,500 acres of undeveloped rural lands for Native Hawaiian use. The HHCA, with amendments, is still in effect today.

From 1921 until 1959 these trust lands were administered by the Hawaiian Homes Commission (“HHC”) with oversight by the United States Department of Interior. In 1959 when Hawaii became a state, the Hawaii Admission Act required the incorporation of the HHCA into the Hawaii State Constitution and transferred the trust lands to the state.⁵

³ In 1993 the U.S. Congress passed a joint Apology Resolution regarding the overthrow of the government of a sovereign nation. This was an “acknowledgement that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States and further acknowledged that the native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum” (U.S. Public Law 103-150 (107 Stat. 1510)).

⁴ Hawaiian Homes Commission Act 1920, 48 Stat. 108.

⁵ Hawaii Statehood Act, 73 Stat. 4 This historical description is taken largely from S. Rep. 108-85, 108th Cong. 1st Sess. (2003). Note that this portion of the Hawaii Constitution may not be amended without consent of the United States, and the United States retains the right to bring suit for breach of the trust imposed. The HHCA is

The Department of Hawaiian Home Lands (DHHL) was created by the Hawaii State Legislature in 1960 for the purposes of administering the Hawaiian Home Lands (HHL) program and managing the Hawaiian Home Lands trust. Although state lands, the HHC, acting through the DHHL, retains exclusive management authority for HHL.⁶ The Congress of the United States continues to reserve the right to alter, amend or repeal the provisions of the HHCA.⁷ The congressional mandate that resulted in the HHCA being included as part of the Hawaii State Constitution created a situation unique to Hawaii for the regulation of public utilities on HHL.

B. Purpose of the Hawaiian Homes Commission Act

Section 101, "Purpose", of the Hawaiian Homes Commission Act explains the aims of the Hawaiian Homelands program as follows:

- (a) The Congress of the United States and the State of Hawaii declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-determination for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians.
- (b) The principal purposes of this Act include but are not limited to:
 - (1) Establishing a permanent land base for the benefit and use of native Hawaiians, upon which they may live, farm, ranch, and otherwise engage in commercial or industrial or any other activities as authorized in this Act;
 - (2) Placing native Hawaiians on the lands set aside under this Act in a prompt and efficient manner and assuring long-term tenancy to beneficiaries of this Act and their successors; (emphasis added)
 - (3) Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity;

now considered Hawaiian Constitutional law, rather than federal law. As such, state statutes which conflict with the HHCA are preempted. *Kepo`o v. Watson*, 952 P.2d 379, 87 Hawaii 91 (1998). ("Kepo`o") Preemption does not extend to ordinary police powers. *State v. Jim*, 907 P.2d 754 (1995).

⁶ *Ahuna v. Department of Hawaiian Home Lands*, 640 P. 2d 1161, 1168 (1982).

⁷ State of Hawaii Constitution, Art. XII, Sec.1; HHCA section 223.

(4) Providing adequate amounts of water and supporting infrastructure, so that homestead lands will always be usable and accessible; and

(5) Providing financial support and technical assistance to native Hawaiian beneficiaries of this Act so that by pursuing strategies to enhance economic self-sufficiency and promote community-based development, the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining.

(c) In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the provisions of this Act on behalf of the native Hawaiian beneficiaries of the Act.

(d) Nothing in this Act shall be construed to:

(1) Affect the rights of the descendants of the indigenous citizens of the Kingdom of Hawaii to seek redress of any wrongful activities associated with the overthrow of the Kingdom of Hawaii; or

(2) Alter the obligations of the United States and the State of Hawaii to carry out their public trust responsibilities under section 5 of the Admission Act to native Hawaiians and other descendants of the indigenous citizens of the Kingdom of Hawaii. [L 1990, c 349, §1]

Clearly the goal of facilitating a “long-term tenancy” for resettlement of the HHL was contingent upon also fostering economic development for economic self-sufficiency of the Native Hawaiians. Almost 100 years after the passage of the HHCA, Native Hawaiians are still striving to achieve resettlement and perpetuation, which make broadband communications an essential component for attracting new business and creating jobs for potential Native Hawaiian residents of HHL.

C. Implications of Geographic Isolation

From the beginning problems began with an absence of a definitive description of "available lands" designated by the Act; continuing with apparently illegal land withdrawals or diversions; and complicated by inadequate maintenance of land inventory records. As a result,

DHHL does not have a complete or accurate inventory of the 203,500 acres designated under the Act, nor of the 190,000 acres for which DHHL now claims responsibility.

The original lands were hardly conducive to the agriculture practiced by earlier Native Hawaiians. Sugar companies had lobbied the government to exclude lands used for sugar production, then the state's economic engine. With no money to develop these lands for agriculture, many lots were used strictly for housing. With the majority of lots being located on islands other than Oahu, there was an immediate geographic isolation from the state economic activity primarily located on Oahu. In the first 70 years of the program, only 3,000 families were placed on Hawaiian Home Lands.

In a survey conducted in 2008, the number of DHHL applicants increased 57% since 1995 with residential applications highest on Oahu, with 9,187 residential applications. The island with the next highest number of applications is Hawaii, with 2,974 residential applications. These applications for residence on Oahu reflect the desire to be in a geographic location without isolation and conducive to economic livelihood.

The same survey indicates there have been more than 5,000 new Applicants for DHHL land from 2003 to 2008 when the previous survey was conducted. There were also over 5,000 Applicants that have been on the wait list for over 20 years. In 2008 about 41% of Applicants were over the age of 55, and almost half of those are over 65. Although the total number of DHHL beneficiaries, both Lessees and Applicants, has increased over 7% since the last time this survey was done in 2003, the wait list has grown faster than the ability to provide awards.

Another challenge for the Native Hawaiian population is the disparity in income and economic levels in comparison to the general population. Below are statistics from several surveys indicating this economic characteristic.

Poverty Level & Percentage of Households below HUD Guidelines for Housing Assistance

Survey/Study	All Hawaii Households	Hawaiian & Part-Hawaiian Households	DHHL Lessee Households
Lessee Survey 2008: Estimated % of Households with Incomes below 80% of HUD Median	NA	NA	51
Housing Policy Study of 2006: Estimated % of Households with Incomes below 80% of HUD Median	45	46	70
US Census: % of Households below Poverty	11	16	13

The challenge set before Native Americans of embarking on a mission of resettlement in geographically isolated areas is daunting, under any circumstance. However, the challenge before Native Hawaiians is extreme. A relatively small group of Native Hawaiians remain to serve as a nucleus for resettlement. And to deploy reliable and secure underground broadband infrastructure in these remote areas of Hawaii that are the targets for resettlement represents tremendous construction and cost challenges. It is clearly evident from Sandwich Isles experience that costs of constructing communications infrastructure in Hawaii are among the highest anywhere in the world. Admittedly, the HHL are remote, considering their location on the islands of Hawaii. The bigger reality, however, is that the entire state of Hawaii is but a “smudge” in the middle of the Pacific Ocean, at least 2,600 miles from the nearest continental

land mass. Mobilizing construction equipment, shipping and warehousing materials, provisioning a qualified work force for the complex construction effort, and penetrating various types of near impossible terrain create extreme cost barriers to underground broadband infrastructure construction. These factors explain to a large extent why the previous incumbent Local Exchange Carriers serving Hawaii failed to invest in critical communications infrastructure, and why the current incumbent lost significant market share and was embroiled in a bankruptcy court proceeding the last couple years.

The historical similarities and the negative impacts of geographic isolation justify eligibility of Native Hawaiians for inclusion in federal programs that are intended to improve the socio-economic standing of American Indians and Alaska Natives. Very little has been accomplished over the past 100 years to bring Native Hawaiians closer to a sustained existence on set aside lands, where cultural traditions can remain an integral part of everyday life. The challenges associated with resettling the HHL are significant. DHHL has a heavy obligation before it to bring infrastructure and utilities to unserved HHL areas. Likewise, the challenge to Sandwich Isles is formidable. This is due in no small part to the lack of economic opportunity prevalent on HHL today that deter Native Hawaiian beneficiaries. As was recounted, the geographic isolation of the HHL works against economic development. Native Hawaiians cannot freely choose to resettle these remote areas. Even though large waiting lists give evidence of that desire, the HHL are without job opportunities sufficient to provide an economic base for continued subsistence of Native Hawaiian families.

D. Serving Hawaiian Homelands Presents Other Unique Challenges

1. Sandwich Isles' Service Area consists of rural, low density portions of volcanic islands separated by deep ocean.

As recounted more fully in its Petition for Waiver of the Definition of "Study Area,"⁸ Congress created the Hawaiian Homelands ("HHL") in 1921 for the benefit of Native Hawaiians.⁹ The HHL consist of a total of 203,500 acres in 70 non-contiguous areas, 98% of which are rural, distributed over the six major islands of Hawaii. Like much of rural Hawaii, the HHL historically were plagued with inadequate or non-existent telephone service. Unable to obtain commitments for improvement from the then incumbent, GTE, the Department of Hawaiian Homelands granted a license in 1995 to Sandwich Isles' parent, Waimana Enterprises, to serve the entire HHL. Following passage of the Telecommunications Act of 1996, the Hawaii PUC designated Sandwich Isles as an Eligible Telecommunications Carrier ("ETC").

On October 29, 2004 the Commission released its order granting the GTE (by then Verizon) Application for Review of the Common Carrier Bureau's 1998 grant to Sandwich Isles of waivers of the incumbent local exchange carrier requirements that allowed it to participate in the NECA pools and receive Universal Service Fund support. The Commission concluded that Sandwich Isles should have applied for a study area waiver, but stayed the effect of its order provided Sandwich Isles filed such a waiver petition within 60 days.¹⁰

⁸ Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, and Sections 36.611, and 69.2(hh) of the Commission's Rules, CC Doc. No. 96-45, filed Dec. 27, 2004, pp 5-6.

⁹ 48 Stat. 108. With the passage of the Admissions Act of 1959, Congress created a shared trust responsibility for HHL with the State of Hawaii. 73 Stat 4.

¹⁰ *GTE Hawaiian Telephone Company, Inc., Application for Review of a Decision by the Common Carrier Bureau, Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Memorandum Opinion and Order, 19 FCC Rcd. 22268 (2004).

The petition for waiver was timely filed and in May 2005 the Bureau granted Sandwich Isles a “Study Area Waiver” for all of the HHL except a small portion, mainly in the Honolulu area, that had been served by GTE in 1997.¹¹ The Bureau recognized that Sandwich Isles was in the process of constructing a backbone infrastructure to “connect all of the Hawaiian home lands (sic) on all six of the major Hawaiian Islands.”¹² The Study Area Waiver Order thus found that the public interest would be served by grant of the waiver: “...because of the significant investment to provide service in areas and to customers that did not previously have service....Sandwich Isles’ construction schedule involves deploying backbone switching and transport infrastructure.”¹³

The Hawaiian Islands, unlike islands of the other 49 states, are not part of the continental land mass, but are the result of volcanic deposition from the ocean floor, and are separated from each other by open seas up to two miles deep, subject to swift currents. Construction of inter-island facilities is thus expensive and involves an extensive permitting process. Environmental restrictions designed to protect marine life severely limit the time during which undersea facilities are allowed to be constructed. The thin top soil lays on volcanic rock, coral and sand. Despite its reputation for a usually balmy climate, Hawaii is subject to recurring severe tropical storms which easily destroy aerial telecommunications plant. As all locations are not far from the ocean, telecommunications facilities are subject to the corrosive tropical marine environment. As a result of these factors, modern, reliable communications infrastructure is exceptionally expensive to construct and operate anywhere in the state. These challenges were accurately

¹¹ Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the *Commission’s Rules*, Order 20 FCC Rcd 8999 (WCB 2005), *applic. rev. pending*. (“Study Area Waiver Order”).

¹² Study Area Waiver Order at para. 19.

¹³ *Id.*

described at greater length in the Petition of Hawaiian Telcom for waiver of the Universal Service Fund rules.¹⁴

The high cost of physical facilities in rural Hawaii is compounded by the low population density of most of the state outside the metropolitan area of Honolulu. Not only does Sandwich Isles' study area have no population centers, for a variety of reasons outside of its control, only a portion of the projected approximately 20,000 home sites have been completed and occupied. As a result, traffic volumes to and from Sandwich Isles' customers are relatively low for an area spread out over more than 400 miles.

Sandwich Isles is a much younger company than other rural telephone companies serving high-cost areas, so that the slow pace by which the HHL have been developed has left Sandwich Isles to operate under "start-up" conditions much longer than originally expected. Because substantial infrastructure, including physical plant and administrative capability is needed to begin service to a small subscriber base, the HHL initial per unit costs are unavoidably high. As subscriber counts increase, the resulting traffic volumes will spread the common infrastructure costs over a wider base, thereby reducing Sandwich Isles' unit cost.

2. The successive owners of the dominant Hawaiian LEC have historically underinvested in facilities to serve the outer islands and rural areas.

Although GTE claimed to trace Hawaiian Telephone Company's operating authority to the Hawaiian Monarchy, neither it nor the successor owners of Hawaiian Telcom, Verizon and now Carlyle have invested in adequate facilities to serve the outer islands and the rural areas of

¹⁴ Hawaiian Telcom Inc., Petition for Waiver of Sections 54.309 and 54.3 13(d)(vi) of the Commission's Rules, Dec. 31, 2007 ("HT USF Petition"); Federal Communications Commission, Public Notice, Comment Sought on Hawaiian Telcom, Inc.'s Petition for Waiver of High Cost Universal Service Support Rules, WC Doc. No. 08-4, DA 08-131, Jan. 18, 2008 (Petition attached as Exhibit 3); Comments of Sandwich Isles Communications, Inc., February 19, 2008.

Hawaii. Outer island terrestrial facilities reaching the Hawaiian Home Lands are non-existent. The lack of adequate service finally led the legislature to authorize the state commission to certify additional telephone companies.¹⁵ The PUC determined that telephone service in rural areas was less than adequate and ordered GTE to show cause why it should not authorize alternative providers in rural areas.¹⁶ Subsequently the PUC authorized TelHawaii to replace GTE in one rural exchange and this Commission granted a study area waiver over GTE's objection that recognized the concerns with GTE's service to rural areas.¹⁷

The inadequate rural service was especially severe in the Hawaiian Homelands. At best, GTE would offer to provide multi-party service in some areas unless the subscriber or DHHL paid the cost of converting to single party service.¹⁸ The reluctance of GTE to invest in facilities to serve the Hawaiian Homelands eventually led DHHL to issue a license to Waimana Enterprises, Sandwich Isles' parent, to serve the entire homelands. The many residents that supported Sandwich Isles' study area waiver petition quickly recognized the great improvement in affordability and service.¹⁹ The Chairman of the Hawaiian Homes Commission commented on Sandwich Isles' study area waiver petition that: "Prior to issuing SIC the license, there were many beneficiaries living on HHL that did not have phone service due to the high cost either

¹⁵ "We passed Act 80 which lead to the Hawai'i Public Utility Commission opening the way for additional telephone companies to serve our *neglected* rural areas with modern infrastructure capable of delivering advanced services." Letter from Robert N. Herkes, State Representative, 5th District to Marlene H. Dortch, FCC, CC Doc. 96-45, Jun. 29, 2005

¹⁶ Hawaii Public Utility Commission Doc. No. 7497, Order No. 13626, Nov. 2, 1994.

¹⁷ *Petition for Waivers Filed by TelAlaska, Inc. and TelHawaii, Inc. Concerning Section 36.611, 36.612, 61.41(c)(2) and the Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, DA 97-1508, 12 FCC Rcd 10309 (Com. Car. Bur.1997). TelHawaii eventually abandoned its efforts following continued litigation by GTE and Sandwich Isles bought some of its switching equipment.

¹⁸ Affidavit of Michael Crozier, Sandwich Isles Reply to Late-Filed Comments and Opposition, AAD 97-42, Oct. 2, 1997.

¹⁹ See generally, comments of HHL residents cited in Reply Comments of Sandwich Isles Communications, Inc., Feb. 22, 2005. pp. 2-4.

they or DHHL would have to pay to install the infrastructure. Today these beneficiaries enjoy the same service that is available in urban areas.”²⁰

III. TODAY’S UNIVERSAL SERVICE FUNDS ARE A “SAFETY-NET”

If the existing universal service programs were not in place, it is unlikely that any Native American communities on Tribal lands would have the quality of communications service they have today. And what has been accomplished is small when compared to the need that exists throughout Tribal lands. There are only eight tribally owned and operated communications companies serving the whole of Indian country – there are over 565 Indian tribes, only 311 of which possess Tribal lands. Much remains to be done.

Therefore, universal service programs must be maintained at existing levels to benefit Native American communities, and these programs must become “fixed in place” – that is, the regulatory uncertainty that is prevalent in the current environment must be replaced with long-term federal regulatory policy that is needed to attract capital. Only then can communications infrastructure be deployed on Tribal lands and communications parity be achieved. Lenders will not make loans for needed infrastructure without such certainty. Native American groups on Tribal lands that are underserved will not be able to step forward with more aggressive demands for “comparable” communications services without such regulatory policy.

The eight tribal members of the National Tribal Telecommunications Association have been held up as a model for other tribes to follow in their quest for a quality communications platform on Tribal lands. Tribal governance and operation of these companies has allowed them to truly identify and meet the needs of their native peoples. However, the start-up efforts of

²⁰ Letter from Micah A. Kane, Chairman, Hawaiian Homes Commission to Marlene H. Dortch, FCC, Dec. 23, 2004.

these eight tribes will be for naught, if they are not supported with sufficient USF. If these eight are allowed to fail, other American Indian tribes will have no model of success to follow, and consequently the vision of a future in which the tribe cares for its own communications needs will disappear like the mist.

This Commission and our industry recognize that the promise of broadband communications is critical to the survival of the nation. Certainly the criticality for Native American groups that are now struggling to obtain economic parity and quality of life enhancements to be enjoyed by future generations on Tribal lands is much greater, and possibly, much more final. Over the past “hundred years” the rhetoric has bubbled forth, but little has been done to bring communications parity to Native Americans. The time to deliver on trust responsibilities in this critical area of communications is well beyond past due.

IV. A NEW UNIVERSAL SERVICE PROGRAM – “NATIVE AMERICANS”

The National Broadband Plan clearly summarizes the many benefits that will accrue to communities as a result of broadband services becoming readily available in America. The Native American groups, including Native Hawaiians, have historically been significantly challenged by the federal government’s “exile policies,” supposedly aimed at successfully resettling these groups on Tribal lands. In reality, the economics work against a successful resettlement of these governmental set aside lands. To counter the effects of geographic isolation, the FCC should facilitate creation of a robust broadband communications platform on Tribal lands, including HHL, to serve these native groups. With broadband services readily available in these areas, the native groups can embark on a mission to develop their own businesses and attract other new businesses to further economic development on Tribal lands, including HHL, so a base for economic stability and growth can be attained. Without an

economic base, native peoples will be unable to successfully resettle the lands duly given them via Congressional Acts and may not collectively sustain their cultures and traditions.

A “one size fits all” approach for universal service reform as outlined in the National Broadband Plan is not workable for the disadvantaged group comprising Native Americans, i.e. American Indians, Alaska Natives, and Native Hawaiians. An exemption from the transition to the Connect America Fund is justified. In addition, a specific “safety-net” feature for Native Americans should be put in place by this Commission to ensure continued access to capital, whether the broadband providers serving Tribal lands, including Hawaiian Homelands, are subject to a CAF transition or made exempt.

Access to capital is fundamentally based upon an assurance that the lender will be repaid, if the loan is made. A true “safety net” USF program for Native Americans, which would be perceived favorably by its primary lender, the USDA-RUS, would ensure that government loan covenants, mainly financial performance objectives are met. The “times interest earned ratio” (TIER) is the primary metric evaluated annually by RUS. A “safety-net” feature that assured this target result would provide RUS with the confidence it needs to make further loans to build-out broadband infrastructure on Tribal lands.

The Commission should adopt a separate USF program entitled, “Native Americans.” This program would be added to the existing universal service programs included in the Commission rules that support rural Local Exchange Carriers, including the High Cost Loop Fund, Local Switching Support, and Interstate Common Line Support. USAC would administer this new program and it would be funded by the USF contribution mechanism.

Existing USF program support funds, i.e. High Cost Loop Fund, Local Switching Support, and Interstate Common Line Support would be distributed to those existing and future

Eligible Telecommunications Carriers (ETCs) serving Native Americans on Tribal lands. In addition to these support funds, an explicit “safety-net” payment from a Native Broadband Fund would be paid-out to ensure that “sufficient” USF funds (net gap approach) are received by each eligible ETC, meeting the cash flow and net income requirements of lenders. Only after such regulatory certainty is achieved through new Commission policy and rules specific to Native Americans will capital be made available for continued infrastructure deployment on Tribal lands, including the Hawaiian Home Lands.²¹

A new universal service program is needed to overcome the financial obstacles inherent in constructing critical, backbone broadband infrastructure for Tribal lands. A provision of the Telecom Act of 1996, Section 254 (b)(3), established the goal of making available to all Americans at affordable rates advanced communications services. Given the numerous disadvantages causing Native Americans to lag behind the rest of the country in broadband adoption, a Native Broadband Fund (NBF) is necessary to ensure continued deployment of needed infrastructure. One of the most pressing problems affecting rural Local Exchange Carrier’s is their inability to borrow capital due to current regulatory uncertainty. A NBF, if it meets the 1996 Telecom Act goals for universal service funding programs of “sufficiency” and “predictability,” will overcome this general regulatory uncertainty and provide stability and renewed access to capital for broadband providers that serve Tribal lands.

A properly designed NBF, i.e. “safety net fund,” can overcome the continued regulatory uncertainty destined for our industry over the next several years as universal service and inter-carrier compensation reform are accomplished. Regardless of the ways in which these existing

²¹ A detailed description of the “safety-net” concept is attached as Appendix B, which presents a conceptual outline for a Native Broadband Fund that could effectively provide a financial “safety net” that would allow eligible broadband service providers on Tribal lands to remain viable.

programs are modified and regardless of the number of years used to transition to new broadband support programs, a properly devised NBF will ensure the ongoing viability of eligible carriers devoted to serving Tribal lands and Native Americans, including Native Hawaiians. Continuous deployment of a robust broadband communications platform will work toward the greater fulfillment of congressional mandates directed toward resettlement of Tribal lands and economically sustaining newly formed communities on those lands.

V. CONCLUSION

When one considers the daunting task of deploying broadband in rural America, the challenges only become greater for Native Americans on Tribal lands, including the Hawaiian Home Lands. If the existing universal service programs were not in place, it is unlikely that any Native American communities on Tribal lands would have the quality of communications service they have today. And what has been accomplished is small, when compared to the need that continues to exist throughout Tribal lands. Lack of infrastructure on Tribal lands is the primary reason this Commission must take quick action to facilitate Native Americans catching up with the rest of the nation. The Commission should undertake corrective action and create a new universal service program, “Native Americans,” specifically for the dual purposes of 1) funding broadband infrastructure on Tribal lands and 2) sustaining affordable broadband services for Native Americans settled on those lands.

In the above comments Sandwich Isles has also shown why Native Hawaiians should be considered a Native American group residing on “Tribal lands,” similar to American Indians and Alaska Natives, as the FCC considers the unique needs of tribal groups and appropriate broadband regulatory policy that will address those needs. Furthermore, the NTCB believe that all eligible broadband service providers serving “Tribal lands” should receive Native Broadband

Funds (“NBF”) through a new “Native Americans” universal service program. Such support for the continued deployment of broadband infrastructure on Tribal lands will facilitate the accomplishment of broader congressional objectives to ensure the successful resettlement of these Tribal lands. To this end the FCC should adopt rules to establish and implement a NBF to facilitate the continued deployment of broadband infrastructure and services on Tribal lands. Over time broadband services will help Native Americans progress and better assimilate by making possible better educational curriculum, improved health care, and economic development opportunities on Tribal lands. While advancing in these ways, Native Americans will also be empowered to preserve and share their cultures and traditions for generations to come.

Respectfully submitted,

WAIMANA ENTERPRISES, INC.

By /s/ Alan W. Pedersen

MESCALERO APACHE TEL, INC.

By /s/ Godfrey Enjady
General Manager

June 20, 2011

Appendix A

NATIVE TELECOM COALITION FOR BROADBAND

June 20, 2011 Comments in CG Doc. No. 11-41

John Badal
CEO
Sacred Wind Communications, Inc.

Frank Demolli
Tribal Judge/General Counsel
Pueblo of Pojoaque

Linda Gutierrez
General Manager
Fort Mojave Telecommunications, Inc.

Paul Kelly
CEO/General Manager
Cordova Telephone Cooperative

James Roger Madalena
Director
Five Sandoval Indian Pueblos

Tosawi Marshall
Executive Director
American Indian Chamber of Commerce of Texas

Steve Merriam
CEO/General Manager
Arctic Slope Telephone Association Cooperative, Inc.

Doug Neal
CEO/General Manager
OTZ Telephone Cooperative

Shirley Ortiz
General Manager
San Carlos Apache Telecommunications Utility, Inc.

Ted Pedro
Executive Director
The American Indian Chamber of Commerce of New Mexico

Brenda Shepard
CEO
TelAlaska, Inc.

Nathan Small
Chairman
Shoshone-Bannock Tribes

NATIVE TELECOM COALITION FOR BROADBAND

June 20, 2011 Comments in CG Doc. No. 11-41

APPENDIX B

NATIVE BROADBAND FUND CONCEPT

FCC NATIONAL BROADBAND PLAN TEXT (Box 8-4, pg 152)

“Many tribal communities face significant obstacles to the deployment of broadband infrastructure, including high build-out costs, limited financial resources that deter investment by commercial providers and a shortage of technically trained members who can undertake deployment and adoption planning . . . Tribes need substantially greater financial support than is presently available to them, and accelerating Tribal broadband deployment will require increased funding.”

THE CONCEPT

The Native Broadband Fund includes a proposal for a Universal Service Fund program designed to provide increased USF funding, but only as needed, to ensure that broadband service providers have a continuing financial ability to meet the broadband communications needs of Native Americans they serve.

The plan incorporates a "safety net" mechanism which removes regulatory uncertainty and encourages lenders to make loans to those qualified providers building out to and serving Native Americans on Tribal lands, including the Hawaiian Home Lands.

- The “safety net” ensures the continued financial viability of eligible broadband service providers on Tribal lands. The FCC may choose to exempt qualified providers from Connect America Fund provisions and retain the existing USF rural carrier programs (i.e. HCLF, LSS, and ICLS) or implement a new regulatory regime, i.e. the Connect America Fund. However, the proposed “safety net” will become a permanent feature of the new Native Broadband Fund, and once adopted, will provide the financial stability needed to attract capital.

The FCC will establish and oversee a new universal service support program to be known as the Native Broadband Fund (“NBF”). The NBF will provide support exclusively to eligible providers of voice and broadband services delivered to American Indians and Alaska Natives on Tribal Lands and Native Hawaiians on the Hawaiian Homelands. The NBF will be established pursuant to Sections 214 and 254 of the Communications Act¹ and the implementing rules will be a subpart of Part 54 of the FCC rules.

¹ Subject to FCC determination that it has sufficient existing authority, or, if necessary, Congressional action granting such authority.

NATIVE BROADBAND FUND CONCEPT

The NBF will provide Eligible Telecommunications Carriers (“ETCs”) with “net gap” support sufficient to recover any shortfall resulting from a comparison of:

1. The projected annual revenue requirement (unseparated, no interstate/intrastate cost allocation necessary) for the provision of native communications services with
2. The projected annual revenues to be received from such services, subject to an annual true-up adjustment comparing actual revenue requirement with actual revenue received.

Communications services include voice and high-speed broadband services, and other additional services designated by the FCC.

NBF payments made to all eligible NBF ETCs will be funded by the Universal Service Fund (USF) Contribution Mechanism.²

Each eligible NBF ETC that applies to the Administrator for NBF support will certify that it provides all its Native American customers with access to broadband speeds meeting the FCC minimum requirements (currently at least 4Mbps down and 1Mbps up)³.

The annual revenue requirement study should be adapted, as much as is reasonably possible, from other annual filings the eligible NBF ETC currently provides for the RUS (Form 479) and USAC (other USF program data submissions). The NBF requirement for each eligible NBF ETC is the overall revenue shortfall, if one exists, to provide communications services to American Indians, Alaska Natives, and Native Hawaiians.

- A shortfall results if the NBF ETC unseparated revenue requirement exceeds all revenues collected from communications services at end-user rates not less than national benchmark rates. The FCC will provide a schedule of national benchmark rates for communications services, which will be used by the Administrator to impute revenue amounts where the eligible NBF ETC end-user rates are determined by the Administrator to be less than national benchmark rates.

² A new and expanded contribution base, including broadband providers/services, should be adopted by the FCC as a necessary step toward sustaining all current and future USF programs.

³ Until Alaska villages and other Tribal lands have access to affordable Middle Mile transport with sufficient bandwidth capacity, Alaska and other NBF ETCs must be exempted from the FCC minimum requirement.

NATIVE BROADBAND FUND CONCEPT

- Revenues will be all revenues collected from communications services, including but not limited to end user revenues, other USF support amounts, and revenues received from FCC or state public utility commission approved individual tariffs or revenue pooling arrangements.
- The unseparated revenue requirement will be calculated incorporating part 32 operating expenses, including taxes, plus a net income amount. The unseparated revenue requirement will include a net income amount necessary for the eligible NBF ETC to achieve its "Times Interest Earned Ratio" (TIER), which is required of the carrier by the Rural Utilities Service (default TIER of 1.5 in the event no RUS prescribed TIER).

The addition of the TIER mechanism described above is necessary to keep companies financially viable during the transition of the current USF to a Connect America Fund (CAF) or other regulatory regime.⁴ The transition will be phased in over 8 years (or as directed by the Commission), allowing the Commission necessary time to fully implement the CAF while providing NBF ETCs with the necessary funding to assist in the continued deployment of broadband-capable networks.

Except for the State of Alaska, if the eligible NBF ETC serves non-tribal customers exceeding 50% of its total customer base in its study area, the calculated NBF shortfall, if it exists, will be adjusted downward to an amount reflecting only the pro-rata share of its tribal operations (may use an average ratio for the Native investment, revenue, and number of customers within the study area).⁵

To remain an ETC eligible for NBF, all recipients are required to provide the Administrator with a copy of its annual ETC recertification report filed with its state public utility commission. The recipient will also provide a copy of the state public utility commission certification letter provided to the FCC and USAC. If the recipient does not file a recertification with a state public

⁴ The FCC may choose to exempt NBF ETCs from CAF provisions. The "safety net" mechanism must be a permanent feature of any regulatory regime proscribed for NBF ETCs.

⁵ This is an important provision for non-tribally owned companies, since many tribes are served by RBOCs/RLECs that serve native and non-native service areas. Alaska NBF ETCs, however, are exempted from the pro-rata apportionment of an NBF shortfall. The FCC classifies "Tribal land" as a "reservation" as defined by the Bureau of Indian Affairs. Title 25 of the Code of Federal Regulations, Section 20.1(v) is used by the Bureau of Indian Affairs to define "reservation" and it incorporates all Alaska.

NATIVE BROADBAND FUND CONCEPT

utility commission, it must provide a copy of the recertification filed with the FCC.⁶

⁶ In recognition of American Indian Tribal sovereignty, Tribal governments should play an integral role, including consultation with the FCC, in the process for designating Eligible Telecommunications Carriers to provide communications services to the reservation and receive universal service funds.

NATIVE BROADBAND FUND CONCEPT

SUPPORTING USF NOI REPLY COMMENTS FILED AUGUST 2010

Specific to the extreme plight of Native American populations that are geographically isolated on Tribal lands, the Associations “. . . agree the Commission should give special consideration to improving broadband deployment and adoption levels in Tribal lands, including areas such as the Hawaiian Homelands. Tribal lands are typically located in geographically-isolated areas, where small pockets of Native American groups are served. The costs associated with delivering broadband services to these consumers are very high even when compared to other rural areas.” (NECA, NTCA, OPASTCO, WTA, the Rural Alliance, and 38 concurring Associations at pg. 8)

The Alaska Telephone Association (ATA) not only supported inclusion of native Hawaiians with the other two Native American groups, i.e. American Indians and Alaska Natives, but also suggested another important pricing consideration for broadband services on Tribal lands. ATA states, “the tremendous cost of . . . transport . . . often prohibits the local provider from offering its customers reasonably priced broadband services. Those high costs are due to factors specific to each locale, but all are aspects of vast distances, extreme terrain and weather, and small populations.” ATA then suggests that a USF pricing discount program, similar to that for Rural Health Care services, be applicable for Tribal land areas. The result would be truly comparable pricing for broadband services on Tribal lands. (ATA at pgs. 13-14)